
In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Francisco Building Corp., Ltd., a
corporation,

Appellant,

vs.

Leigh M. Battson, as Trustee, and H.
H. Cotton, Charles C. Irwin, John
Treasor and J. B. Van Nuys, as
the Medical Center Building First
Mortgage Bondholders' Protective
Committee,

Appellees.

Notice of Motion to Dismiss Appeal, Motion to Dis-
miss Appeal, Affidavit of Leigh M. Battson and
Memorandum of Points and Authorities in Sup-
port Thereof.

FILED

MAR - 7 1936

PAUL P. O'BRIEN,
CLERK

H. W. O'MELVENY,
WALTER K. TULLER,
LOUIS W. MYERS,
HOMER I. MITCHELL,

Title Ins. Bldg., 433 S. Spring St., Los Angeles,
Attorneys for Appellees.

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I.

Subsequent to the decision of the District Court, the property which is the subject of debtor's proposed plan of reorganization was sold by Leigh M. Battson, as trustee under the trust deed securing the bonds, to Medico-Dental Building Company of Los Angeles, a corporation, and since debtor now has no right, title or interest therein, the question of whether debtor's proposed plan of reorganization is fair, equitable and feasible is moot..... 20

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Appellees.

NOTICE OF MOTION TO DISMISS APPEAL.

*To Appellant Francisco Building Corp., Ltd., and to Its
Attorneys, Elbert E. Hensley and John H. Klenke:*

Please take notice that appellees will, on Tuesday, March 17, 1936, at the hour of 10:30 A. M., or as soon thereafter as counsel can be heard, move the above entitled court, at its courtroom in the United States Courthouse and Post Office Building, San Francisco, California, that the appeal of Francisco Building Corp., Ltd., be dismissed for the reason that said appeal has become moot.

Said motion will be made upon the grounds set forth in the written motion served and filed with this notice of motion and will be based upon the Transcript of Record on file in the above entitled cause, and upon the affidavit of Leigh M. Battson, and the Memorandum of Points and Authorities served and filed with this notice of motion.

Dated this 6th day of March, 1936.

H. W. O'MELVENY,
WALTER K. TULLER,
LOUIS W. MYERS,
HOMER I. MITCHELL,
Attorneys for Appellees.

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Appellees.

MOTION TO DISMISS APPEAL.

Appellees hereby move the above entitled court that the appeal of Francisco Building Corp., Ltd., be dismissed for the reason that said appeal has become moot.

The grounds for this motion are:

1. The appeal is taken from an order refusing to confirm a plan of reorganization proposed by Debtor pursuant to the provisions of Section 77B of the Bankruptcy Act and an order setting aside and vacating an injunction re-

straining the sale of the Medico-Dental Building by the trustee of a trust indenture securing a bonded indebtedness of Debtor's predecessor. Although at the time of the filing of Debtor's petition, under Section 77B of the Bankruptcy Act, and at the time of the allowance of the petition, Debtor owned the Medico-Dental Building, which was the subject of the proposed reorganization, Debtor has not since October 31, 1935, owned any right, title or interest in said building. Said building was sold to Medico-Dental Building Company of Los Angeles, pursuant to the terms of said trust indenture. Debtor was given notice of said sale and made no objection thereto. The question of whether or not Debtor's proposed plan of reorganization was fair, equitable and feasible is moot because even if the order of the lower court should be reversed, Debtor's property, having been conveyed to Medico-Dental Building Company of Los Angeles, is no longer available for a plan of reorganization proposed by Debtor. Debtor has not, and if a trustee in bankruptcy should be appointed, he would not have any right, title or interest in or to said property validly conveyed to Medico-Dental Building Company of Los Angeles.

2. There is now no actual controversy involving real and substantial rights between appellant and appellees and there is no subject matter upon which Debtor's proposed plan of reorganization could operate, even if the order of the lower court refusing to confirm said plan should be set aside.

3. The only question now involved in this appeal is that of costs.

This motion is based upon the Transcript of Record on file in the above entitled cause and upon the affidavit of Leigh M. Battson and the Memorandum of Points and Authorities filed with this motion.

Dated this 6th day of March, 1936.

H. W. O'MELVENY,
WALTER K. TULLER,
LOUIS W. MYERS,
HOMER I. MITCHELL,
Attorneys for Appellees.

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Mortgage Bondholders' Protective
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Appellees.

AFFIDAVIT OF LEIGH M. BATTSON IN SUP-
PORT OF MOTION TO DISMISS APPEAL.

State of California,)
) ss.
County of Los Angeles.)

LEIGH M. BATTSON, being first duly sworn, deposes and
says:

I am and ever since February 17, 1931, have been the
trustee under the terms of that certain Trust Deed and
Chattel Mortgage made by Morgan Building Corporation,
appellant's predecessor, to secure its Six Per Cent First

Mortgage Gold Bonds dated as of December 1, 1924, in the aggregate principal amount of \$615,000.00, which trust deed and chattel mortgage covered the assets of Debtor described in Paragraph VI of Debtor's Petition for Reorganization filed in the above-entitled cause. As alleged in said Petition, by reason of a default in the performance of the terms of said trust deed and chattel mortgage, I took possession of the property described in said Paragraph VI on September 26, 1933, and ever since said date and until the sale of the property on October 31, 1935, as hereinafter set forth, I managed and operated the same. In taking such possession, I did so as trustee under said trust deed and not as agent or attorney in fact of the trustor or its successor.

On May 14, 1934, the following defaults, among others, had occurred under the terms of said trust indenture:

(a) The principal of said bonds maturing on December 1, 1932, aggregating \$22,000.00 in amount, had not been paid as provided in said bonds and said trust indenture, or otherwise, so that there remained unpaid the total amount of said bonds maturing on December 1, 1932, together with interest thereon at the rate of 7% per annum from December 1, 1932, until paid;

(b) The coupons maturing on June 1, 1932, and representing the semi-annual interest maturing on said date on said bonds, said coupons aggregating \$15,735.00 in amount, had not been paid, as provided in said coupons and said trust indenture, or otherwise, so that there remained unpaid the total amount of said coupons, together with interest thereon at the rate of 7% per annum from June 1, 1932, until paid;

(c) The coupons maturing on December 1, 1932, and representing the semi-annual interest maturing on said date on said bonds, said coupons aggregating \$15,735.00 in amount, had not been paid, as provided in said coupons and said trust indenture, or otherwise, so that there remained unpaid the total amount of said coupons, together with interest thereon at the rate of 7% per annum from December 1, 1932, until paid;

(d) The coupons maturing on June 1, 1933, and representing the semi-annual interest maturing on said date on said bonds, said coupons aggregating \$15,075.00 in amount, had not been paid, as provided in said coupons and said trust indenture, or otherwise, so that there remained unpaid the total amount of said coupons, together with interest thereon at the rate of 7% per annum from June 1, 1933, until paid;

(e) The deposits of \$314.70, \$314.70 and \$301.50 required to be made on May 15, 1932, November 15, 1932, and May 15, 1933, respectively, in accordance with the provisions of Section 1 of Article II and Section 3 of Article III of said trust indenture, on account of federal income taxes, had not been made as provided in said trust indenture, or otherwise, so that there remained unpaid on account of said deposits the total sum of \$930.90;

(f) The deposits of \$1,958.33 each, required to be made on December 15, 1932, January 15, 1933, February 15, 1933, March 15, 1933, April 15, 1933, May 15, 1933, June 15, 1933, July 15, 1933, August 15, 1933, September 15, 1933, and October 15, 1933,

respectively, in accordance with the provisions of Section 1 of Article II of said trust indenture, on account of the principal of said bonds maturing on December 1, 1933, had not been made as provided in said trust indenture, or otherwise, so that there remained unpaid on account of said deposits the total sum of \$21,541.63;

(g) The principal of said bonds maturing on December 1, 1933, aggregating \$23,500.00 in amount, had not been paid as provided in said bonds and trust indenture, or otherwise.

(h) The coupons maturing on December 1, 1933, and representing the semi-annual interest maturing on said date on said bonds, said coupons aggregating \$15,075.00 in amount, had not been paid as provided in said coupons and said trust indenture, or otherwise;

(i) The deposit of \$301.50 required to be made on November 15, 1933, in accordance with the provisions of Section 1 of Article II and Section 3 of Article III of said trust indenture on account of federal income taxes, had not been made as provided in said trust indenture, or otherwise, so that there remained unpaid on May 14, 1934, on account of said deposit the total amount thereof;

(j) The deposits of \$2,083.33 each, required to be made on December 15, 1933, January 15, 1934, February 15, 1934, March 15, 1934, and April 15, 1934, respectively, in accordance with the provisions

of Section 1 of Article II of said trust indenture, on account of the principal of said bonds maturing on December 1, 1934, had not been made as provided in said trust indenture, or otherwise, so that there remained unpaid on May 14, 1934, on account of said deposits the total sum of \$10,416.65;

(k) The deposits of \$2,395.00 each, required to be made on December 15, 1933, January 15, 1934, February 15, 1934, March 15, 1934, and April 15, 1934, respectively, in accordance with the provisions of Section 1 of Article II of said trust indenture, on account of interest due on said bonds on June 1, 1934, had not been made as provided in said trust indenture, or otherwise, so that there remained unpaid on May 14, 1934, on account of said deposits the total sum of \$11,975.00.

On May 14, 1934, I filed for record in Book 12773 at page 142 of Official Records in the office of the County Recorder of Los Angeles County, the county wherein the property covered by said trust indenture was situated, a notice of default identifying said trust indenture by stating the name of the trustor, to-wit, Morgan Building Corporation, and giving the book and page where said trust indenture is recorded, to-wit, Page 113 of Book 4817 of Official Records of Los Angeles County, stating that a breach of the obligations for which said trust indenture was security had occurred, to-wit, the defaults hereinabove set forth, and stating my election to sell the property described in said trust indenture to satisfy the obligations.

On July 31, 1935 (subsequent to the date of the order of the United States District Court in and for the Southern District of California, Central Division, vacating and setting aside the injunction restraining the sale of the property covered by said trust indenture), I, as trustee, gave to Morgan Building Corporation and to the Debtor written notice of the defaults hereinabove set forth in paragraphs (a) to (g), inclusive. On September 4, 1935, by reason of the continuance of said defaults for a period of more than thirty (30) days after service of written notice, I, by written notice duly given to Morgan Building Corporation and to Debtor, declared the principal of all bonds secured by said trust indenture and then outstanding to be due and payable immediately.

Subsequent to the date of the order of said United States District Court vacating and setting aside said injunction and in accordance with the terms of said trust indenture, I, as trustee, gave notice that I would sell the property described in said trust deed on October 16, 1935, at 947 West Eighth Street, Los Angeles, California, at the main entrance on Eighth Street of the building which is covered by said trust indenture. Said notice was given as follows:

(a) By posting written notice containing a particular description of the real property to be sold and a general description of the personal property to be sold, stating the time and place of said sale, for twenty (20) days, to-wit, from September 24, 1935, to and including October 16, 1935, in three (3) public places (each of said places being a public place

in the City of Los Angeles, County of Los Angeles, State of California, said city being the city where said sale was to and did take place), to-wit:

- (1) On the bulletin board at the Main Street entrance of the City Hall in the City of Los Angeles, County of Los Angeles, State of California;
- (2) On the bulletin board at the east entrance on Justicia Street of the Hall of Justice in the City of Los Angeles, County of Los Angeles, State of California;
- (3) On the bulletin board at the Broadway entrance of the Hall of Records in the City of Los Angeles, County of Los Angeles, State of California.

(b) By posting a copy of said written notice of the time and place of said sale at least twenty (20) days before the date set for said sale, to-wit, on September 24, 1935, in each of three (3) conspicuous places on the property to be sold, to-wit:

- (1) On the south side of the building standing upon the premises to be sold, at the southeast corner of said building and approximately four (4) feet from the ground;
- (2) On the west side of the building standing upon the premises to be sold, at the southwest corner of said building and approximately four (4) feet from the ground;

- (3) On the west side of the building standing upon the premises to be sold, at the northwest corner of said building and approximately four (4) feet from the ground.

(c) By posting written notice of the time and place of said sale for not less than five (5) days nor more than ten (10) days, to-wit, from October 10, 1935, to and including October 16, 1935, in three (3) public places (each of said places being a public place in the City of Los Angeles, County of Los Angeles, State of California, said city being the city where said sale was to and did take place), to-wit:

- (1) On the bulletin board at the Main Street entrance of the City Hall in the City of Los Angeles, County of Los Angeles, State of California;
- (2) On the bulletin board at the east entrance on Justicia Street of the Hall of Justice, in the City of Los Angeles, County of Los Angeles, State of California;
- (3) On the bulletin board at the Broadway entrance of the Hall of Records in the City of Los Angeles, County of Los Angeles, State of California.

(d) By posting written notice of the time and place of said sale for not less than five (5) days nor more than ten (10) days before the date set for said sale, to-wit, from October 10, 1935, to and including October 16, 1935, in each of three (3) conspicuous places upon the property to be sold, to-wit:

- (1) On the south side of the building standing upon the premises to be sold, at the southeast corner of said building, and approximately four (4) feet from the ground;
- (2) On the west side of the building standing upon the premises to be sold, at the southwest corner of said building and approximately four (4) feet from the ground;
- (3) On the west side of the building standing upon the premises to be sold, at the northwest corner of said building and approximately four (4) feet from the ground.

(e) By publishing said notice of the time and place of sale, containing a particular description of the real property to be sold and a general description of the personal property to be sold, once a week for twenty (20) days prior to the date of such sale, and upon the following days, to-wit: September 19, September 26, October 3 and October 10, all in the year 1935, in a daily newspaper of general circulation printed and published in the City of Los Angeles, County of Los Angeles, State of California (that being the city where said sale was to and did take place), to-wit: The Los Angeles Daily Journal.

At 10:00 A. M. on October 16, 1935, by oral announcement, I adjourned said sale to 10:00 A. M. on October 31, 1935, at the place originally set for said sale. On October 17, 1935, I caused Frank C. Prescott III to mail a copy of the notice of sale to the following persons and cor-

porations, among others: Francisco Building Corp., Ltd., 947 West Eighth Street, Los Angeles, California; Francisco, etc., care A. R. Walker, 437 South Hill Street, Los Angeles, California; Francisco Building Corp., Ltd., care Elbert E. Hensley, Esq., 825 Insurance Exchange Building, 318 West Ninth Street, Los Angeles, California; Elbert E. Hensley, Esq., 825 Insurance Exchange Building, 318 West Ninth Street, Los Angeles, California.

On October 31, 1935, at 10:00 A. M., at the place originally set for said sale, I sold the property to Medico-Dental Building Company of Los Angeles, a corporation, which company was the highest and best bidder at said sale. Neither Debtor nor anyone on its behalf objected to the holding of said sale or made any protest with reference thereto. On said date I executed and delivered to Medico-Dental Building Company of Los Angeles a deed to said property, which deed was recorded on November 1, 1935, in Book 13797, at Page 95, Official Records of Los Angeles County. Said corporation has paid me the consideration which it bid for said property and is now and ever since October 31, 1935, has been the owner of said property.

LEIGH M. BATTSON.

Subscribed and sworn to before me this 6th day of March, 1936.

[Seal]

CAROLINE E. TRACY,
*Notary Public in and for the State of
California, County of Los Angeles.*

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Appellees.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS
APPEAL.

I.

Subsequent to the Decision of the District Court, the Property Which Is the Subject of Debtor's Proposed Plan of Reorganization Was Sold by Leigh M. Battson, as Trustee Under the Trust Deed Securing the Bonds, to Medico-Dental Building Company of Los Angeles, a Corporation, and Since Debtor Now Has No Right, Title or Interest Therein, the Question of Whether Debtor's Proposed Plan of Reorganization Is Fair, Equitable and Feasible Is Moot.

- A. The Record on Appeal Together With the Affidavit of Leigh M. Battson Filed With the Motion to Dismiss Show That Subsequent to the Taking of Its Appeal the Debtor Lost All Right, Title and Interest in the Property Which Is the Subject of Debtor's Proposed Plan of Reorganization.

(1) The verified petition of the Bondholders' Committee shows as follows:

- (a) On or about January 27, 1925, Debtor's predecessor issued bonds in the principal amount of \$615,000.00 and, as security for their payment, executed a trust deed covering the Medico-Dental Building (formerly known as the Medical Center Building) at the corner of Eighth and Francisco Streets in Los Angeles, the equipment and personal property therein, the appurtenances thereto and the rents, issues and profits thereof. [Tr. 5-53.] The property so hypothecated constitutes all of the assets of the debtor. [Tr. 8.]

- (b) By payment of serial maturities the principal amount of bonds was reduced to \$524,500.00. Default was made in the payment of interest due on June 1, 1932, and of the installment of principal due December 1, 1932. No payments of principal or interest have been made since December 1, 1931. [Tr. 54-55.]
- (c) In accordance with the terms of the trust deed, Leigh M. Battson, as successor trustee, did on September 26, 1933, take possession of and since said date has managed and operated the property. [Tr. 56-57.]
- (d) In accordance with the terms of the trust deed, Leigh M. Battson, as such trustee, did on October 31, 1933, declare all bonds then outstanding due and payable immediately. [Tr. 55-56.]

(2) The affidavit of Leigh M. Battson shows as follows:

- (a) On May 14, 1934, he, as trustee, filed for record the notice required by Section 2924 of the Civil Code of California.
- (b) On July 31, 1935 (subsequent to the date of the order of the District Court vacating and setting aside the injunction), he, as trustee, gave debtor and its predecessor written notice of the defaults.
- (c) In accordance with the terms of the trust deed, he, as trustee, again declared all bonds outstanding due and payable.
- (d) Subsequent to the date of the order of the District Court vacating and setting aside the injunction, and

in accordance with the terms of the trust deed, he, as trustee, gave notice that he would sell the property described in the trust deed on October 16, 1935.

- (e) On October 31, 1935 (to which date the sale had been duly and regularly postponed), the property was sold to Medico-Dental Building Company of Los Angeles, a corporation. Debtor had notice of the fact this sale was to be made and made no objection thereto.
- (f) On October 31, 1935, he, as trustee, executed and delivered a deed to said property to said purchaser, which deed was recorded on November 1, 1935, in Book 13797 at page 95, Official Records of Los Angeles County.

B. The Sale Was Made With the Consent of the District Court.

(1) On April 30, 1935, the District Court approved Debtor's Petition and enjoined any sale of the property. [Tr. pp. 17-19.]

(2) On July 29, 1935, the District Court determined that the Debtor's Proposed Plan of Reorganization was not fair, equitable or feasible and vacated and set aside the injunction so as to permit a sale by Leigh M. Battson, trustee under the bond indenture. [Tr. pp. 94-95.]

C. No Order Was Obtained by Appellant Enjoining the Sale Pending This Appeal.

D. In Ordinary Bankruptcies, Where the Lienholder Is in Possession of the Property at the time of the Filing of the Petition in Bankruptcy, a Sale Made by the Lienholder (in the Absence of an Injunction) Is Valid, Whether or Not the Consent of the Court Has Been Obtained.

(1) Rule stated:

Hiscock v. Varick Bank of New York (1906), 206 U. S. 28, 41, holding valid a sale by a pledgee after the filing of a petition in bankruptcy where the pledgee was in possession of the pledged property at the time of the filing of the petition in bankruptcy.

Robinson v. Kay (C. C. A. 9, 1925), 7 F. (2d) 576, 578, holding valid a sale by mortgagee of real property with power of sale after the filing of a petition in bankruptcy, where the mortgagee was in constructive possession of the property at the time of the filing of the petition in bankruptcy, having commenced strict foreclosure proceedings, prior to the filing of the petition, by giving the notice required by law. The court recognized that the statute gave it power to enjoin the sale and pointed out that such portion of the statute would not have been necessary if sales made by lienholders were to be regarded as a nullity. This was a plenary action.

In re Smith (D. C. Tex., 1924), 3 F. (2d) 40, 43, holding valid a sale made by a trustee under a trust deed, after the filing of a petition in bankruptcy, where the mortgagee was in constructive possession of the property at the time of the filing of the petition in bankruptcy, having commenced street foreclosure

proceedings prior to the filing of the petition, by giving the notice required by law. This was a plenary action.

(2) The power of the bankruptcy court to temporarily enjoin sales by lienholders in possession has been upheld only because such an injunction temporarily affects the remedy and does not deprive the lienholder of substantive rights.

Continental Illinois Bank & Trust Co. v. Chicago, Rock Island Pacific Co. (1935), 294 U. S. 648, 681;

Robinson v. Kay (C. C. A. 9, 1925), 7 F. (2d) 576, 578;

In re Purkett, Douglas & Co. (D. C. S. D. Cal.). 50 F. (2d) 435, cited with approval by the Supreme Court in the *Rock Island* case.

E. Under Section 77B, Where the Lienholder Is in Possession of the Property at the Time of the Filing of the Petition Thereunder, a Sale Made by the Lienholder (in the Absence of an Injunction) Is Valid Whether or Not the Consent of the Court Has Been Obtained.

(1) There is nothing in Section 77B to indicate any intention on the part of Congress that foreclosure sales, made by lienholders in possession, are to be void when made during the pendency of the bankruptcy, even if made without the consent of the court.

(a) A contrary intent is indicated by giving the court express authority to enjoin foreclosure proceedings. If Congress had intended that sales made by lienholders in possession should be void, there would

have been no necessity for the provisions giving courts the power to issue an injunction. The maxim *expressio unius est exclusio alterius* is applicable.

Clause (1) of Subdivision (c) of Section 77B;

Arthur v. Cumming, 91 U. S. 362, 364;

In re Herzekopf (C. C. A. 9th, 1903), 121 Fed. 544, 546;

Thomas v. Winne (C. C. A. 4th, 1903), 122 Fed. 395, 400.

- (b) There being no provisions of Section 77B changing the rules of ordinary bankruptcy in this respect, the rules of ordinary bankruptcy should be held applicable and the sale should be held valid.

Hiscock v. Varick Bank of New York (1906), 206 U. S. 28, 41;

Robinson v. Kay (C. C. A. 9, 1925), 7 F. (2d) 576, 578.

- (2) As in ordinary bankruptcies, foreclosure sales by lienholders in possession can be temporarily enjoined because such an injunction does not deprive the lienholder of substantive rights.

Continental Illinois Nat. Bk. & Tr. Co. v. Chicago, Rock Island Pac. Co. (1935), 294 U. S. 648, 681.

- (3) The right to sell the property, in the absence of an injunction, is a substantive right of which no valid statute can deprive a lienholder.

Louisville Joint Stock Land Bank v. Radford, 79 Law Ed. 920.

(4) If a sale by the lienholder were to be held void upon authority of Section 77B, the effect of Section 77B would be to deprive the lienholder of a substantive right in violation of the Fifth Amendment. Section 77B should not be so construed. The sale being valid, the property which was to have been the subject of debtor's proposed reorganization is beyond the jurisdiction of the bankruptcy court and the question of the fairness of said plan is moot.

II.

Grounds for Motion to Dismiss Appeal May Be
Shown by Affidavit.

Codlin v. Kohlhausen, 181 U. S. 151.

III.

Where the Only Question Involved in the Appeal Is
That of Costs, it Should Be Dismissed.

Paper Bag Cases, 105 U. S. 766, 772.

Respectfully submitted,

H. W. O'MELVENY,
WALTER K. TULLER,
LOUIS W. MYERS,
HOMER I. MITCHELL,

Attorneys for Appellees.